NO. 648

In the Supreme Court of the United States

OCTOBER TERM, 1942

ANCEL EARP,
Petitioner,

VERSUS

H. C. JONES, Collector of Internal Revenue for the District of Oklahoma.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

R. M. RAINEY,
STREETER B. FLYNN,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

January, 1943.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

INDEX

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 3

Statement 3

Specifications of Error 4

Reasons for Granting Writ 5

Conclusion 10

Appendix 11

AUTHORITIES CITED

Bennett v. Commissioner, B. T. A., Docket No. 101715 (opinion filed Sept. 2, 1941) 8

B. M. Phelps, 13 B. T. A. 1248 8

Burnett v. Leininger, 285 U. S. 136 5

Champlin v. Commissioner of Internal Revenue, 71 Fed. (2d) 23 (10th Cir.) 8

Commissioner of Internal Revenue v. Olds, 60 Fed. (2d) 252 (6th Cir.) 8

Crooks v. Harrelson, 282 U. S. 55, 61 9

Harrington v. Commissioner, 21 B. T. A. 260 8

Harrison v. Schaffner, 312 U. S. 579 7

Hazelwood v. Commissioner, 29 B. T. A. 595 8

Helvering v. Clifford, 309 U. S. 331 7

Helvering v. Stuart, opinion filed Nov. 16, 1942 6

Humphreys v. Commissioner of Internal Revenue, 88 Fed. (2d) 430 (2d Cir.) 8

Page

Jasper Sipes, 31 B. T. A. 709 8

Kell v. Commissioner, 88 Fed. (2d) 455 8

Ledbetter v. Commissioner, B. T. A., Docket No. 10482 (opinion filed Jan. 19, 1942) 8

Lynch v. Commissioner, B. T. A., Docket No. 102149.. 8

Newell v. Commissioner, 17 B. T. A. 93 8

Oakley v. Commissioner, 24 B. T. A. 1082..... 8

Rose v. Commissioner, 65 Fed. (2d) 616 8

Walter W. Moyer, 35 B. T. A. 1155 (Okla.) 8

STATUTES CITED

Revenue Act of 1938, Ch. 289, 52 Stat. 447 3

Sections 181, 182, 187, of Revenue Act of 1936, Ch. 690, 49 Stat. 1648 3

NO. . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1942.

ANCEL EARP,
Petitioner,

VERSUS

H. C. JONES, Collector of Internal Revenue for the District of Oklahoma.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Ancel Earp prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above cause on October 30, 1942, affirming a judgment of the United States District Court for the Western District of Oklahoma (Rehearing denied December 10, 1942).

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals is not yet reported (R. 148).

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered October 30, 1942 (R. 152), and a rehearing denied December 10, 1942 (R. 166). The juris-

diction of this Court is invoked under Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a concededly (R. 149) valid ordinary partnership established and existing under the laws of the State of Oklahoma between husband and wife can be ignored and the entire net income therefrom be taxed to the husband in complete disregard of the partnership provisions of the Revenue Act of 1936, C. 690, 49 Stat. 1648, and the Revenue Act of 1938, C. 289, 52 Stat. 447. Sections 181, 187 of both Acts are the same. Section 182 is slightly different.

2. Whether in the absence of any federal law defining the elements necessary to constitute an ordinary partnership the local law in regard thereto is controlling and is incorporated in the federal taxing acts, particularly Sections 181, 182 and 187, Revenue Acts of 1936 and 1938.

3. Whether for income tax purposes petitioners "economic status" (R. 149) remained unchanged after making a valid gift to his wife of property having a value of $36,640.00 which she thereafter contributed to the partnership or whether it can be said "for all practical purposes by such a gift petitioner surrendered nothing" (R. 151).

4. Whether petitioner can be taxed on income produced from property owned by his wife and contributed by her to a partnership composed of his wife and himself.

STATUTES INVOLVED

Sections 181, 182, 187 of Revenue Act of 1936, Chapter 690, 49 Stat. 1648, and

Revenue Act of 1938, Chapter 289, 52 Stat. 447.

STATEMENT

This is an action to recover alleged overpayment of federal income taxes for the years 1937 and 1938 by petitioner, a member of a partnership composed of himself and wife, engaged in the general insurance business, other than life. On December 1, 1937, petitioner conveyed to his wife a one-half interest in all of the assets of his business (R. 22, 12). On the same day a written partnership agreement was executed (R. 23, 12). Th property conveyed for gift tax purposes was found to have a value of $36,640.00 (R. 22). Partnership books were at once opened and partnership income tax returns were filed (R. 24). *The Circuit Court of Appeals concedes the partnership to be legal under Oklahoma law* (R. 149). The Commissioner of Internal Revenue disregarded the partnership and assessed deficiencies against petitioner for the two years in question, based upon the assumption that all income derived from the partnership was the income of petitioner (R. 20, 21). The taxes claimed were paid and on November 18, 1940, claims for refunds were filed and after disallowance (R. 21) this action was filed. The District Court rendered judgment in favor of the Collector (80, 81). The Circuit Court of Appeals affirmed that judgment (R. 152).

The Circuit Court of Appeals purporting to rely upon opinions of this Court felt justified after concluding that

the partnership was valid under state law in then disregarding it entirely and embarking upon an inquiry as to whether petitioner's "economic status" had undergone a change after the transfer of property to his wife, which she thereafter contributed to the partnership. It concluded it had not and that "for all practical purposes he (petitioner) surrendered nothing." Its justification for such inquiry and conclusion was as follows:

> "The Supreme Court has quite clearly laid down the principles which must guide us in the determination of this question."

A petition for rehearing (R. 157) was filed for the purpose of directing the Circuit Court's attention particularly to the two cases of *Helvering* v. *Stuart*, decided by this Court on November 16, 1942, as being in conflict with the opinion herein, which failed to give any recognition to the incorporation of the local law dealing with partnerships in the federal tax acts. The opinion in *Helvering* v. *Stuart* was further cited in the petition for rehearing for the purpose of showing that the few cases referred to in the Circuit Court's opinion had no application to a situation similar to that presented herein where there had been a valid *permanent* transfer of property and not a mere assignment of income.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred in holding that although the petitioner was a member of a concededly legal partnership under Oklahoma law, all of the income from such partnership was nevertheless to be considered as his

income for federal income tax purposes, in disregard of plain, specific and applicable statutes dealing with partnerships and the taxation of members thereof. (Sections 181, 182, 187, Revenue Acts of 1936 & 1938).

REASONS FOR GRANTING WRIT

1. The Circuit Court of Appeals, in holding that the income of a concededly valid partnership under Oklahoma law should all be taxed to one of the members thereof, ignored plain and specific statutes dealing with the taxation of members of partnerships. Sections 181, 182 and 187, Revenue Acts of 1936 and 1938. If the judgment rendered below is to stand, no member of a valid partnership under state law would ever know, even approximately, the extent of his tax liability at the time he filed his return or how his return should be filed. He would have no guide if the applicable Acts of Congress are to be ignored, for determining whether the Commissioner of Internal Revenue might or might not see fit to disregard a valid partnership.

2. The decision of the court below is in conflict with this Court decision in *Burnett* v. *Leininger*, 285 U. S. 136. In that case, where a member of a partnership transferred a one-half interest in his partnership interest to his wife, this Court, after citing the partnership taxing statute, directed its inquiry to the question as to whether a partnership between husband and wife existed as a result of the transaction. It was found that since the other member of the husband's partnership had not consented to the admission of the wife as a member, such lack of consent was fatal to the creation of a valid partnership. The case arose in

Ohio and on page 140 of the opinion it will be observed Ohio cases are cited as sustaining the Court's conclusions. There is no intimation in the opinion that any inquiry could or should be made, other than to determine whether or not under state law a valid partnership existed, and the existence of such a partnership in the case now before the Court is conceded. Had this Court not been of the opinion that in view of the partnership provisions of the taxing statute, the only question for consideration was as to whether a valid partnership existed under the state law, it could have very easily disposed of the case by simply saying, as did the Court below herein, that even if a valid partnership under state law did exist, the husband would still be taxable, as he and his wife should be considered as one "economic unit." This court in the *Burnett* v. *Leininger* case treated the question of the validity of the claimed partnership as decisive. The Court below considered that question unimportant.

3. The opinion of the lower court is in conflict with the decision of this Court in the two cases of *Helvering* v. *Stuart*, opinion filed November 16, 1942, in that it failed to recognize the incorporation by Congress of local law in the partnership taxing statutes. The right of petitioner and his wife to form a valid partnership depends upon the interpretation placed upon their arrangement by state law. The lower court concedes the arrangement herein created a valid partnership under state law. The state law created the right to transact business in partnership form, and when rights obtained under local law are once established "these rights are subject to the federal definition of taxa-

bility." *Helvering* v. *Stuart, supra.* Sections 181, 182 and 183, Revenue Act 1936, is a clear and specific designation as to how the right to engage in business in the form of a partnership created under state law shall be taxed. The Commissioner, in the Stuart cases, relied upon such cases as *Helvering* v. *Clifford,* 309 U. S. 331; *Harrison* v. *Schaffner,* 312 U. S. 579, etc. It was upon such cases that the opinion of the lower court herein is largely based. Their inapplicability is clearly pointed out by this Court in the Stuart cases.

4. The decision herein is in principle in conflict with the decision of this Court in the case of *United States* v. *Cambridge Loan & Building Co.,* 278 U. S. 55. That case involved the exemption of a building and loan association under the income tax laws. The taxing statute did not define building and loan associations just as the taxing statute herein fails to define a partnership. It was contended by the government that although the taxpayer was a building and loan association under the laws of the state of Ohio, it was in reality a bank, and was therefore not entitled to the exemption. This Court in deciding adversely to the Commissioner, said:

> "The State of Ohio has recognized and still recognizes the respondent as belonging to the class which its name indicates. Very possibly the company has strained its privileges to near the limit, but we are not prepared to condemn the nomenclature adopted by the State."

The decision complained of is in conflict with numerous decisions of the lower federal courts and of the Board

of Tax Appeals recognizing family partnerships all of which were cited in briefs filed in the Circuit Court. *Commissioner of Internal Revenue* v. *Olds,* 60 Fed. (2d) 252 (Sixth Circuit), *Humphreys* v. *Commissioner of Internal Revenue,* 88 Fed. (2d) 430 (Second Circuit), *Rose* v. *Commissioner,* 65 Fed. (2d) 616.

Champlin v. *Commissioner of Internal Revenue,* 71 Fed. (2d), 23, 10th Circuit. (This case arose in Oklahoma and involved an Oklahoma partnership. The court therein recognized the Oklahoma law as controlling. Oklahoma Statutes and cases are cited on page 27). *Kell* v. *Commissioner,* 88 Fed. (2d) 455; *Walter W. Moyer,* 35 B. T. A. 1155 (Okla.); *Jasper Sipes,* 31 B. T. A. 709; *B. M. Phelps,* 13 B. T. A. 1248; *Oakley* v. *Commissioner,* 24 B. T. A. 1082; *Harrington* v. *Commissioner,* 21 B. T. A. 260; *Hazelwood* v. *Commissioner,* 29 B. T. A. 595; *Newell* v. *Commissioner,* 17 B. T. A. 93; *Bennett* v. *Commissioner,* B. T. A., Docket No. 101715; (opinion filed September 2 1941); *Lynch* v. *Commissioner,* B. T. A., Docket No. 102149; *Ledbetter* v. *Commissioner* B. T. A., Docket No. 10482 (opinion filed January 19, 1942).

The facts in the Ledbetter case are almost identical with the facts herein. The taxpayer therein, Ledbetter, is engaged in the same line of business as is your petitioner and they are competitors. The judgment of the District Court herein is referred to by the Board of Tax Appeals in the next to the last paragraph of the Ledbetter opinion. The instant case is distinguished therein on three grounds, based upon the original findings by the District Court

herein to the effect that (1) petitioner's wife "never executed any documents evidencing a transfer of her undivided one-half interest of the taxpayer's insurance business to the new partnership." (2) That she contributed no personal service to the partnership, nor did she participate in its management. (3) That she contributed no capital to the partnership. After the Ledbetter opinion was filed on January 19, 1942, the District Court herein, however, entered amended findings of fact, which were not filed until March 18, 1942, and were in lieu of the earlier findings to which the Board refers. Under the first findings made herein by the District Court there clearly would have been no partnership under the state law, and had those findings been adhered to, this case would have been distinguishable from the Ledbetter case since under the original findings there would have been no partnership under the local law. Those grounds of distinction, however, no longer exist, and the Circuit Court concedes a valid partnership herein under state law.

5. We feel that the questions involved in this case are of public importance since under the opinion herein family partnerships are not recognized as partnerships within the purview of the partnership provisions of the Revenue Acts. No warrant can be found in any case justifying this form of judicial legislation indulged in by the lower court, and we respectfully suggest the lower court erred in endeavoring to modify the plain terms of the taxing statute by construction. *Crooks* v. *Harrelson*, 282 U. S. 55, 61. While we cannot furnish to the court a list

showing the number of cases now pending in various courts involving family partnerships, we feel justified in stating that they are numerous, as we have had requests from attorneys in various parts of the United States, having similar cases, requesting copies of our briefs.

CONCLUSION

It is respectfully submitted that for the reason stated, this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit should be granted.

R. M. RAINEY,
STREETER B. FLYNN,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

January, 1943.

APPENDIX

Revenue Act of 1936, Chapter 690, 49 Stat. 1648, 1709.

"SECTION 181: PARTNERSHIP NOT TAXABLE.

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

"SECTION 182: TAX OF PARTNERS.

"There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year.

"SECTION 187: PARTNERSHIP RETURNS.

"Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners."

Revenue Act of 1938, Chapter 289, 52 Stat. 447, 521.

"SECTION 181.

Same as Revenue Act, 1936, above.

"SECTION 182: TAX OF PARTNERS.

"In computing the net income of each partner, he shall include, whether or not distribution is made to him—

"(a) As a part of his short-term capital gains or losses, his distributive share of the net short-term capital gain or loss of the partnership.

"(b) As a part of his long-term capital gains or losses, his distributive share of the net long-term capital gain or loss of the partnership.

"(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in Section 183 (b), 53 Stat. 69.

"SECTION 187"

Same as Revenue Act, 1936, above.

⊙

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Burnet v. *Leininger*, 285 U. S. 136	6
Cohan v. *Commissioner*, 39 F. (2d) 540	6
Covington v. *Commissioner*, 103 F. (2d) 201	6
Gregory v. *Helvering*, 293 U. S. 465	6
Griffiths v. *Commissioner*, 308 U. S. 355	6, 8
Harrison v. *Schaffner*, 312 U. S. 579	6
Hawkins v. *Mattes*, 171 Okla. 186	8
Helvering v. *Eubank*, 311 U. S. 122	6
Helvering v. *Horst*, 311 U. S. 112	6
Higgins v. *Smith*, 308 U. S. 473	6
Karrick v. *Hannaman*, 168 U. S. 328	8
Kasch v. *Commissioner*, 63 F. (2d) 466, certiorari denied, 290 U. S. 644	6
Lucas v. *Earl*, 281 U. S. 111	6
Mead v. *Commissioner*, 131 F. (2d) 323	6
Phillips v. *Dime Trust & S. D. Co.*, 284 U. S. 160	8
Tinkoff v. *Commissioner*, 120 F. (2d) 564, certiorari denied, 314 U. S. 581	6
Waldburger v. *Helvering*, decided November 5, 1942	6
Wickham v. *Commissioner*, 65 F. (2d) 527	6
Statutes:	
Oklahoma Statutes Annotated, Title 54:	
Sec. 1	6
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 22	9
Sec. 181	9
Sec. 182	9
Revenue Act of 1938, c. 289, 52 Stat. 447:	
Sec. 22	9
Sec. 181	9
Sec. 182	9

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 648

ANCEL EARP, PETITIONER

v.

H. C. JONES, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 148–152) is reported in 131 F. 2d 292.

JURISDICTION

The judgment of the Circuit Court of Appeals was filed October 30, 1942 (R. 152), and a petition for rehearing denied on December 10, 1942 (R. 166). The petition for a writ of certiorari was filed on January 12, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The taxpayer purported to transfer to his wife a one-half interest in his insurance business, which they agreed thereafter to conduct as a partnership. However, he actually operated the business as theretofore, and continued to control the income therefrom. The question presented is whether the court below correctly held that all of such income is taxable to the husband.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

This case involves claims for refund of income taxes of $290.10 for 1937 and $1,475.65 for 1938. The facts, as stipulated (R. 19–27) and found by the District Court (R. 81–83), may be summarized as follows:

Beginning May 1, 1925, the taxpayer acquired the sole interest in and operated an insurance business at Oklahoma City (R. 22). On December 1, 1937, the taxpayer and his wife executed an instrument termed a "Waiver and Agreement" (R. 22, 27–29), providing in part that in consideration of a transfer and assignment to the wife of an undivided one-half interest in the insurance business, having a value of $75,000, the wife would release and waive all right in any claims to the taxpayer's

estate. The parties placed a value of $37,500 upon the interest in the business, and a value of $22,500 upon the wife's right to participate in the taxpayer's estate (R. 22, 28). On the same date the taxpayer executed a "Transfer and Conveyance" to his wife of an undivided one-half interest in the assets and properties of the insurance business, including accounts receivable, contract rights, and other assets (R. 12, 22, 29). On the same date, the taxpayer and his wife signed an instrument termed "Articles of Partnership" (R. 12–14, 23, 29), reciting, among other things, that each of the parties was the owner of a one-half interest in the assets of the business conducted in the name of Ancel Earp and Company; that both parties agree to conduct and operate said business as a general partnership, in the same name, commencing December 1, 1937, and to continue for a period of twenty-five years unless sooner terminated; that each shall participate equally in all of the profits of the partnership, except that if either partner should devote more time to the management and operation such partner may be paid extra compensation from the profits for such services; that each partner shall have an equal voice in the management and operation and shall participate equally in all profits and losses except as stated above; that each partner shall give such time, effort, skill, and endeavor as is necessary for the conduct of the enterprise, and

that all distributions of profits shall be made equally to the partners (R. 13–14).[1]

During the years 1937 and 1938 the taxpayer's wife was a housewife with two minor children. She contributed no personal service to the insurance business, and did not participate in the management of the business, which was managed by the taxpayer (R. 23). The books of the company contained an entry crediting her with $1,092.51 as her share of the profits for December, 1937, and also credited the taxpayer with the sum of $1,092.50, as his share (R. 24). The books reflected a credit to the taxpayer of a salary of $6,600 for 1938, and a credit of one-half of the remaining profit for that year in the sum of $10,040.64, and also showed a credit to the taxpayer's wife of a similar sum of $10,040.64 representing her share of the profits (R. 24).

Income taxes were reported and paid by the tax-

[1] Prior to December 1, 1937, the taxpayer, doing business as Ancel Earp and Company, had agency agreements with four insurance companies, which were canceled on that date and new agency agreements executed with three of the same companies on the same date. Agreements with two additional companies were entered into in 1938. These were signed "Ancel Earp and Company, by Ancel Earp, co-partner" (R. 23). The opening balance sheet for Ancel Earp and Company as of December 1, 1937, listed assets in the amount of $79,170.39, of which $20,754.13 was designated as insurance agency cost (R. 24). The opening entry of the books of the company as of December 1, 1937, contained a credit to the taxpayer's wife of $12,456.88 as capital, and a like amount to the taxpayer as capital (R. 25).

payer and his wife, for both years, upon the basis of a partnership (R. 19–21, 25–26). After taxation of all of the insurance income to the taxpayer (R. 20–21), he filed claims for refund which were disallowed (R. 21), and brought suit thereon in the District Court (R. 6–14).

The District Court found that on December 1, 1937, taxpayer "attempted to create a partnership with his wife in his insurance business" (R. 81–82); that his wife before or after that date was not personally engaged in the insurance business, but attended to her normal household duties as the taxpayer's wife and mother of his children; that the wife made no contribution to the purported partnership other than that which had been given to her by the taxpayer for the purpose of being placed in the partnership about to be formed; that after December 1, 1937, the wife had nothing whatever to do with the management and direction of the insurance business; that the books of the insurance agency were kept as a partnership; that for 1938 the taxpayer drew a salary of $6,600, the books showing that after such payment the profits of the business were equally divided between the taxpayer and his wife; that for 1938 the taxpayer borrowed from his wife the sum of $3,900 of her share of the profits as reflected by the books, for which, he testified, he gave his note which he said had not been repaid (R. 82); that prior to and after December 1, 1937, the income derived from the insurance agency

was used in the main for the general expenses of the family, and that after December 1, 1937, although the books were kept differently, actually there was little if any change in the management of the finances of the taxpayer and his wife (R. 82–83). The court concluded as a fact, from all of the evidence, that the transactions between the taxpayer and his wife on December 1, 1937, constituted an effort by the taxpayer to divide his income from the insurance agency between himself and his wife to reduce his income taxes. It concluded that the entire income was taxable to the taxpayer, and therefore dismissed the complaint (R. 83).

The court below affirmed the judgment of the District Court (R. 152), stating in its opinion (R. 148–152) that a careful examination of the record led to the conclusion that no substantial change was effected by the partnership arrangement (R. 150), that it was not created to carry on a new joint enterprise, that there was no new or different economic unit created, but that the taxpayer under "the cloak of a partnership" continued to do business in substantially the same way, unaffected by the alleged partnership, the real purpose of which was to minimize taxes (R. 151).

ARGUMENT

The decision below is in accord with the well established principle that one may not avoid liability for tax upon his income by a mere assignment of the bare right to receive it. *Lucas* v. *Earl*, 281 U. S.

111; *Helvering* v. *Horst*, 311 U. S. 112; *Helvering* v. *Eubank*, 311 U. S. 122; *Harrison* v. *Schaffner*, 312 U. S. 579. In such circumstances, the construction of the federal statute does not depend upon the legal rights of the parties, *inter sese*, or whether, under state law, the arrangements which they have entered into may technically bear the labels which they have affixed to those arrangements. Cf. *Griffiths* v. *Commissioner*, 308 U. S. 355; *Higgins* v. *Smith*, 308 U. S. 473; *Gregory* v. *Helvering*, 293 U. S. 465. And this principle has frequently been applied in the case of a so-called family partnership which does not represent a true joint enterprise. See, *e. g.*, *Mead* v. *Commissioner*, 131 F. 2d 323 (C. C. A. 5th); *Waldburger* v. *Helvering* (C. C. A. 2d), decided November 5, 1942 (1942 C. C. H., par. 9721); *Tinkoff* v. *Commissioner*, 120 F. 2d 564 (C. C. A. 7th), certiorari denied, 314 U. S. 581; *Covington* v. *Commissioner*, 103 F. 2d 201 (C. C. A. 5th); *Wickham* v. *Commissioner*, 65 F. 2d 527 (C. C. A. 8th); *Kasch* v. *Commissioner*, 63 F. 2d 466 (C. C. A. 5th), certiorari denied, 290 U. S. 644; *Cohan* v. *Commissioner*, 39 F. 2d 540 (C. C. A. 2d); cf. *Burnet* v. *Leininger*, 285 U. S. 136. The partnership provisions of the revenue laws were designed to apply to persons jointly conducting an enterprise,[2] and were no more in-

[2] Moreover, the arrangement herein was probably not even technically a partnership under Oklahoma law. Section 1 of Title 54 of the Oklahoma Statutes Annotated (Appendix *infra*, p. 10) defines a partnership as "the association of two

tended to furnish a device for tax avoidance than were the installment sales provisions which were involved in the *Griffiths* case.

Although it is true, as petitioner indicates (Pet. 8), that family partnerships have been recognized in some situations, particularly where the inactive spouse has contributed actual capital to the enterprise, those cases are not in conflict. Whatever may be said of the correctness of those decisions, they do not furnish sufficient ground for certiorari here.

CONCLUSION

The decision below is correct. There is no conflict. It is, therefore, respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
J. LOUIS MONARCH,
EARL C. CROUTER,
Special Assistants to the Attorney General.

FEBRUARY 1943.

---

or more persons for the purpose of carrying on business together * * *." The carrying on of business together is fundamental. Cf. *Karrick* v. *Hannaman*, 168 U. S. 328. Not only was the burden upon the taxpayer to overcome the Commissioner's determination (*Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160, 167), but it was incumbent upon him to prove the partnership he alleged (*Hawkins* v. *Mattes*, 171 Okla. 186, 191).

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

SEC. 182. TAX OF PARTNERS.

There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year.

Revenue Act of 1938, c. 289, 52 Stat. 447:

Section 22 (a) is identical with Section 22 (a) of the Revenue Act of 1936, *supra.*

Section 181 is identical with Section 181 of the Revenue Act of 1936, *supra.*

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

Oklahoma Statutes Annotated, Title 54:

SEC. 1. *Partnership Defined.*

Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them.

U. S. GOVERNMENT PRINTING OFFICE: 1943

Exh